# In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1266

ERNEST N. MORIAL, LUKE FONTANA, CARL GALMON, RUSSELL J. HENDERSON, and CHRISTINE B. VALTEAU,

Petitioners

versus

JUDICIARY COMMISSION OF THE STATE OF LOUISIANA, CLEVELANT C. BURTON, JAMES H. DRURY, SIDNEY B. FLYNN, JUDGE EARL E. VERON, CHARLES H. HECK, JUDGE PAUL B. LANDRY, JR., JUDGE S. SANFORD LEVY, EDWARD W. STAGG, as members of the Judiciary Commission of the State of Louisiana; JOE SANDERS, FRANK W. SUMMERS, ALBERT TATE, JR., JOHN A. DIXON, JR., WALTER F. MARCUS, PASCAL CALOGERO, JAMES L. DENNIS, as Justices of the Supreme Court of Louisiana; EDWIN W. EDWARDS, in his capacity as Governor, State of Louisiana; WILLIAM J. GUSTE, JR., in his capacity as Attorney General, State of Louisiana; PAUL J. HARDY, in his capacity as Secretary of State, State of Louisiana,

Respondents

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JEFFERSON, BRYAN & GRAY
Trevor G. Bryan
William J. Jefferson
3828 One Shell Square
New Orleans, Louisiana 70139
(504) 561-8933
Counsel for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

# INDEX

# APPENDIX A
## Opinion of the United States District Court

Ernest N. MORIAL, et al.
v.
JUDICIARY COMMISSION OF the STATE OF LOUISIANA

Civ. A. No. 76-3795.

United States District Court, E.D. Louisiana
March 2, 1977

Louisiana appellate judge, who sought to run for mayor of New Orleans, and several of his supporters sought injunctive and declaratory relief with respect to constitutionality of Louisiana statute and judicial canon requiring a judge to resign before becoming a candidate for nonjudicial elective office. The District Court, Cassibry, J., held that: (1) the court had power to adjudicate the claims; (2) plaintiffs had standing and were not required to violate the law in order to have a justiciable controversy; (3) the statute and canon created a chilling and inhibitory effect on exercise of plaintiffs' First Amendment rights of freedom of speech and freedom of association; (4) although the state has a compelling interest in not only averting actual impropriety but also in averting the appearance of impropriety on part of members of the judiciary, the resignation requirement, which is not imposed on other public office holders, was not a necessary or even a reasonably necessary means to effectuate such goal and (5) the statute and canon were overbroad in that they purported to regulate conduct and qualifications which the state cannot constitutionally regulate, namely, qualifications for national office.

Preliminary injunction issued; declaration granted.

Jefferson & Bryan, Trevor G. Bryan, William J. Jefferson, Sidney M. Bach, Cotton, Jones & Dennis, Charles E. Cotton, Arthur A. Lemann, III, Gerdes & Valteau, Louis A. Gerdes, Jr., New Orleans, La., for plaintiffs.

Donald B. Ensenat, New Orleans, La. for defendants.

CASSIBRY, District Judge.

This suit was heard on January 31, 1977. Plaintiffs sought a preliminary injunction and declaratory relief. Defendants' motions to dismiss, and, alternatively, for summary judgment, were also heard. Defendants' motions were denied. A written Order was issued granting plaintiffs' motions for declaratory judgment and for injunction on February 2, 1977. In that Order, the Court indicated that it would issue written Findings of Fact and Conclusions of Law in due course. The following are those Findings of Fact and Conclusions of Law.

IT IS ORDERED that the Order Staying the Effects of the Preliminary Injunction of February 7, 1977, and issued on February 10, 1977, be, and here is, SET ASIDE, and that the Order of February 7, 1977, be, and it is hereby, restored to its full effect.

## FINDINGS OF FACT

1. In 1972, Plaintiff, Ernest N. Morial, was elected Judge of the Court of Appeal, Fourth Circuit, State of Louisiana, and holds the office under the authority of Article 7, Section 9 of the Constitution of Louisiana of 1921, now superseded by the provisions of Article 5, Section 22 of the 1974 Louisiana Constitution.



2. Plaintiffs James F. Clark, Jesse A. Dupart, Luke Fontana, Dyan H. French, Marie J. Galatas, Carl Galmon, Robert F. Guesnon, Russel J. Henderson, Cheryl H. Huffine, Larry Jones, Carol G. Lobenstein, Novyse E. Soniat, and Christine B. Valteau, are residents of the United States and registered voters of the City of New Orleans. Some, or all, of these plaintiffs have voted for plaintiff Morial in past political elections in which he was a candidate including his election to the Louisiana House of Representatives, to be Judge on the Orleans Parish Juvenile Court, and to his present judgeship.

3. Named as defendants are the Judiciary Commission of the State of Louisiana, its members, the Louisiana Supreme Court, its members, Governor Edwin Edwards, individually and in his capacity as Governor of Louisiana, William Guste, individually and in his capacity as Attorney General of the State of Louisiana, and Paul C. Hardy, individually and in his capacity as Secretary of State of Louisiana.

4. The Judiciary Commission is obligated by law to enforce the provisions of the Code of Judicial Conduct for the State of Louisiana, including Canon 7(A)(3). See, *In re Haggerty*, 257 La. 1,241 So.2d 469 (1969). Governor Edwin Edwards, Attorney General William Guste, and Secretary of State Paul C. Hardy are all obligated to enforce the provisions of Louisiana R.S. 42:39 adopted by the Louisiana Legislature in 1968. This Statute prohibits any person presently serving as an elected or appointed Judge of any Court, except those persons serving as justices of the peace, from qualifying as a candidate for *any* nonjudicial local, state or national office without first resigning his judgeship. The Statute further provides that any person elected or appointed Judge of any Court shall not be required to resign his judgeship if that person seeks to qualify as a Judge for the same or

any other Court.

5. The predecessor of Article 5 of the 1974 Constitution, Article VII of the 1921 Constitution, as amended, provided that the judiciary of Louisiana shall, except in certain narrow circumstances, be elected. The durations of the various judicial offices as set forth in the Constitution are uniformly shorter than those set forth in the 1921 Constitution.

6. Article V, Section 22(A), of the 1974 Constitution provides that all Judges shall be elected, except as otherwise provided by law. Article V, Section 25, provides for a Judiciary Commission. This Commission is generally empowered to supervise the conduct of the judiciary of the State of Louisiana. It is authorized to recommend to the Supreme Court of Louisiana that a Judge be censured, suspended, or removed from office for violation of certain enumerated acts of misconduct. Section 22 also empowers the Supreme Court to promulgate rules to implement this Section.

7. The Louisiana Supreme Court, pursuant to the supervisory powers granted it in Article V, Section 5(A), adopted a Code of Judicial Conduct on March 5, 1975. Based upon the model Code of Judicial Conduct of the American Bar Association, this Code contains Canon 7(A)(3). Canon 7(A)(3) provides that a Judge presently holding a full time judicial office should resign such office when he becomes a candidate, either in a party primary or a general election, for any nonjudicial office. The only exception to this prohibition is that a Judge may serve as a delegate to a State Constitutional Convention if the law so provides.

8. The direct predecessor of the present Judiciary Commission, the Committee on Judicial Ethics, enforced the pro-



visions of Canons XIX and XX of the Canons of Judicial Ethics. These Canons, the direct predecessors of Canon 7(A)(3), also provided that a Judge must resign his office before he could become a candidate for any nonjudicial office. Canon XX provided that a Judge should resign so that "it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy, or the success of his party."

9. The provisions of Canons XIX and XX and the provisions of La. R.S. 42:39 have been enforced in the past against Judges who sought to run for nonjudicial office without first resigning their judicial office. *In re Haggerty*, 257 La. 1,241 So.2d 469 (1969).

10. Plaintiff Morial has indicated that he intends to become an active candidate for the nonjudicial office of Mayor in the 1977 election. The Statute and Canon prevent him from doing so without resigning his present office. The thirteen other plaintiffs, all registered voters for the Parish of Orleans and all active supporters of plaintiff Morial in the past, have indicated their intent to assist the campaign of plaintiff Morial in the 1977 mayoralty and vote for plaintiff Morial in the 1977 open primary for Mayor. The Statute and Canon prevent plaintiffs from carrying out their intent unless Morial resigns his judgeship.

11. By letter dated October 15, 1976, plaintiff Morial requested that the Louisiana Supreme Court grant him a leave of absence, without pay, from January 1, 1977 through November 3, 1977. The purpose of this leave of absence was to allow plaintiff Morial to participate as a candidate in the 1977 campaign for the office of Mayor of the City of New Orleans. In his letter plaintiff Morial stated that his request

for leave was made in the light of the prohibition of Canon 7(A)(3).

12. By letter dated October 21, 1976, the Louisiana Supreme Court, in response to plaintiff Morial's letter, unanimously denied plaintiff Morial's request to be granted a leave of absence. In a subsequent letter by plaintiff Morial to the Louisiana Supreme Court Committee on Judicial Ethics dated November 3, 1976, plaintiff Morial inquired whether, in the light of Canon 7(A)(3) he was prohibited from engaging in activities to solicit support for his contemplated campaign for Mayor. On December 2, 1976, the Committee replied unanimously stating that Canon 7(A)(3) prohibits such a course of action. The Committee maintained that plaintiff must first resign his office before he announced his candidacy for that office. The Committee did state, however, that plaintiff Morial could make a "preliminary survey" in order to find out the degree of financial support and voter support that he could expect to receive after he formally announced his candidacy.

13. During the course of deliberations on the request of Judge Morial, Eugene J. Murret, Judicial Administrator, recommended four alternative courses of action that the Louisiana Supreme Court could adopt in answering the request of Judge Morial. Three of the four alternatives were less restrictive than the alternative eventually adopted. These three recommendations did not require Judge Morial to resign immediately from the bench if he became a formal candidate for Mayor. Additionally, two of the recommendations did not require that he resign until he actually qualified as a candidate in August of 1977. Indeed, these latter recommendations may even have been implemented in such a way so as not to require Judge Morial to resign unless he were



elected Mayor. The four recommendations were:

1. Grant a leave of absence, without any conditions or qualifications. In this instance, if Judge Morial commits any judicial improprieties or misuses the judicial office, perhaps proceedings would be instituted against him by the Judiciary Commission.

2. Grant a leave of absence, with qualifications and conditions, e.g., prohibit the use of the title judge, require that he resign the office if he qualifies for the mayoralty election, make it clear that he is not absolved of the responsibility for complying generally with the Code of Judicial Conduct and is not protected by the court's order from possible action by the Judiciary Commission for any abuses.

3. Grant a leave of absence only up to the time of the qualifying period (August 6-11, 1977) rather than through November 30, 1977 as requested, on the grounds that a present state statute would require him to resign anyway in August 1977 if he qualifies (if he has the statute declared unconstitutional after an order granting leave to August 1977, he can always come back later to have the order extended through the qualifying and election period; such a shortened order could be either unrestricted (as in No. 1) or conditioned (as in No. 2)).

4. Refuse to grant the leave of absence.

14. Plaintiff Morial has indicated he objects to the requirement that he resign his judgeship, and seeks declaratory and injunctive relief. The thirteen other named plaintiffs state that they desire plaintiff Morial to retain his judgeship and become an active candidate for Mayor.

15. The Canon and Statute significantly affect and infringe upon important interests of plaintiffs. These include the right to vote, rights of expression and association, and the right to be a candidate for public office.

16. No inherent corrupting influence upon candidates has been shown to exist in political campaigns.

17. No inherent corrupting influence upon candidates has been shown to exist in political campaigns in which judicial officers run for nonjudicial office.

18. No differences have been shown to exist between the conduct of a political campaign for a judicial office and the conduct of a political campaign for a nonjudicial office, and the evidence in the record supports the contention that such campaigns are conducted in the same ways.

19. There has been no showing that the requirement that a Judge abstain from running for a nonjudicial office while a Judge will affect the Judge's ethics or the respect of the public for a Judge and the judiciary, nor has there been a showing that this requirement is needed to reassure the public that a Judge will be fair and impartial in the discharge of his duties. The net effect of the Canon and the law is that while the Judge is required to regularly and frequently subject himself to the approval of the electorate for judicial office, he may run for nonjudicial office only under severe restric-



tions, and at a tremendous risk.

20. Arguments are legion on both sides of the question of whether Judges should be elected or appointed. Louisiana, in its wisdom, has chosen the former, thus involving Judges in politics as much as any other elected official. Since it has, then it may not treat Judge-Candidates any different than it treats other candidates.

21. Having Judges on the bench whose decisions are free of political influence and who are able to vote their conscience is greatly to be desired, and should be encouraged. But when Judges run for reelection or for another judgeship or for a nonjudicial office, particularly when they are required to run frequently, they become just as "politicized" as any other candidate. In Louisiana, Judges raise money, engage in political oratory, make campaign promises, appeal to various political and racial groups, advertise in the media, and run under political party labels in the same way as do other candidates running for nonjudicial office.

22. It is true that the type of Canons and laws at issue here were originally promulgated by people who on the whole have never been Judges, who have not been in the political arena on a frequent basis, and who have not had to make a choice of resignations before running for another political office. Theirs is an idealistic approach, but far from realisitic.

23. No evidence was presented to prove that a Judge who takes a leave of absence while running for a political office will somehow be less respected as a Judge, or be less honest or impartial or fair if he loses and returns to the judgeship. A fairer inference is that he will be a better Judge because he

will have done what the people of Louisiana have said that they like, and that is that he has been out and talked to the people and updated himself concerning their fears and aspirations.

24. It is far easier for nonjudges or even Judges who are appointed to pontificate about cleansing the judiciary if they have never had to do battle in the political arena in a State where Judges are as fair a game as any other candidate, and politics is played to the hilt.

25. When Judges are required to run almost as frequently as all other candidates for office, headlines in newspapers often state that a Judge is "affiliated with this or that political organization or faction." There is campaign oratory that a Judge is a "strict constructionist" or "civil righter" or a "liberal" or "conservative" or "hard" or "soft" or "compassionate" with respect to person charged with crime.

26. The State seeks to have the best of both worlds. It frequently subjects its Judges to the rigors of political campaigns, and then deprives them of a most valuable political right -- the right to run for another office without resigning the judgeship.

27. The Canon and Statute would make far more sense in the cases of Judges who are appointed, or who, after being elected, are required to run against their record rather than against a person. While the Canon and Statute have a noble purpose, they do little to enhance the integrity of the judiciary. If any harm to Judges results from politics as such, then it comes from the fact that the State requires Judges to regularly subject themselves to the political process.



28. I think it may be safe to say that the State requires Judges to run for political office so that they can be constantly reminded that they may not always vote their conscience, but must seriously consider in every decision they make the prejudices and biases of the electorate. It makes a mockery of the constant admonition that Judges receive that they should not succumb to public clamor. Indeed, life appointments have been severely criticized by many, because such Judges too often decide cases contrary to the views of the general public. And the argument has been made that had these Judges been subjected to periodic elections, their decisions would have been quite different.

29. In sum, the State's policy is hypocritical. It requires a Judge to be constantly seasoned in the political process, and then seeks to gloss over this political exposure by the thin facade of the Canon and Statute, which are designed to give the public the idea that even though Judges are elected, that they are not necessarily required to engage in politics at election time.

30. None of these findings should be construed as assucing any State Judge of being politically motivated in any decision he might render. Without exception, I am convinced that they decide their cases fairly and impartially, based on the law and evidence.

31. Viewed against the reality of the full involvement in politics, then there is no rational basis for thus distinguishing between Judges who run for reelection or for a higher judicial office and Judges who run for nonjudicial office.

32. There are numerous less onerous alternatives to requiring resignation of plaintiff Morial in order for him to

run for nonjudicial office. Some of them would adequately protect the State in vindicating their interest in a fair and impartial judiciary and the appearance of being fair and impartial. Under the circumstances he would remain subject to the Code and the law if he conducted himself improperly.

33. Plaintiffs other than Morial named in the complaint have voted for Morial in the past and desire that he be a candidate for Mayor so that he may espouse the issues in which they have an interest and so that they may have the opportunity to vote for him in the next mayoralty election.

34. Other candidates for Mayor have already announced their candidacy, have begun to solicit funds to influence voters, to take polls, and to organize political campaigns.

35. Plaintiff Morial is suffering, and will continue to suffer, irreparable harm unless a preliminary injunction issues to bar the enforcement of the referenced Canon and Act.

36. One stated purpose of the Act and the Canon is to prevent a Judge from using the prestige of his office in his campaign for a nonjudicial position.

37. A judge who resigns his office to run for a nonjudicial position may trade on the prestige of his former position with as much effect as a Judge who takes leave of absence from his judicial position to run for a nonjudicial office.

38. Judges are presently permitted under State law to "use" the prestige of their office in their campaign for reelection or election to a higher judicial office.

39. Nonjudicial elected officials are presently permitted to



"use" the prestige of their office in their campaigns for other nonjudicial offices or for judicial offices.

## CONCLUSIONS OF LAW

[1] 1. The Court has judicial power under Article III of the United States Constitution and is authorized under 28 U.S.C. §1343(3) (1970), 28 U.S.C. §§2201-202 (1970), and 42 U.S.C. §1983 (1970) to adjudicate plaintiffs' claims for declaratory and injunctive relief with respect to the constitutionality of LaR.S. 42:39 and Canon 7(A)(3) of the Code of Judicial Conduct of Louisiana. *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

[2] 2. Plaintiffs' claim that the Statute and Canon violate the equal protection clause of the Fourteenth Amendment of the United States Constitution is "ripe" for adjudication. The Statute and Canon both provide that a Judge must resign his office before he becomes a candidate for nonjudicial elective office. This requirement is not placed upon other nonjudicial elected office holders. Plaintiffs have pursued all possible avenues of relief according to the laws of Louisiana. The only other step which plaintiff Morial could take would be to violate the Statute and Canon by becoming a full fledged candidate for Mayor, thereby risking censure, fine, and possible removal from office. The law does not require that plaintiffs violate a law in order to have a "justiciable" controversy. *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Golden v. Zwickler*, 393 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969); *Aetna Life Insurance Company v. Haworth*, 300 U.S. 27,57 S.Ct. 461, 81 L.Ed.

617 (1937).

[3] 3. Plaintiffs have standing to raise the issue of the unconstitutionality of the Statute and Canon as being in violation of the First and Fourteenth Amendments to the Constitution. Plaintiff Morial has standing to assert such violations because he is "injured in fact" by defendants' actions and because the interest which he seeks to protect is "arguably within the zone of interests to be protected or regulated by the Statute or Constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153; 90 S.Ct. 827, 830, 25 L.Ed. 2d 184 (1970); *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970). The thirteen other plaintiffs have standing because the Statute and Canon infringe upon their right to vote and their right to freely associate in the upcoming electoral campaign. See, e.g., *Reed v. Giarrusso*, 462 F.2d 706 (5th Cir. 1972); *National Student Association v. Hershey*, 134 U.S.App.D.C. 56, 412 F.2d 1103 (1969); *Johnson v. Rockefeller*, 58 F.R.D. 42, 46-47 (S.D.N.Y. 1973); *Moore v. Moore*, 229 F.Supp. 435 (S.D. Ala. 1964).

4. There is a concrete, actual controversy between the parties who have adverse legal interests. This controversy perforce touches the legal relations of the parties. The controversy is capable of being resolved through a specific decree which will be conclusive in character through injunction or otherwise. The Court will not be issuing an "advisory opinion" in any sense of that term. *Aetna Life Insurance Co. v. Haworth*, 57 S.Ct. 461, 300 U.S. 227, 240-241, (1937); 13, Wright, Miller & Cooper, *Federal Practice and Procedure*, §3529 (1975).

[4] 5. A Federal claim arising under 42 U.S.C. §1983



(1970) is supplementary to any State remedies that may be available to the plaintiffs. There is no requirement in the present case that plaintiffs exhaust State remedies in order for this Court to assert jurisdiction over the §1983 claims. *Houghton v. Shafer*, 392 U.S. 639, 88, S.Ct. 2119, 20 L.Ed. 2d 1319 (1968); *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971); *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970); *Mortillaro v. State of Louisiana*, 356 F.Supp. 521 (E.D.La. 1972).

[5] 6. The principles of comity and "federalism" do not serve to bar this Court from granting declaratory or injunctive relief. No proceeding in State Court is pending in this controversy concerning the Statute and Canon of either a civil or criminal nature. Therefore, abstention is not warranted. *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Canton v. Spokane School District*, 498 F.2d 840 (9th Cir. 1974); *Indiana State Emp. Ass'n, Inc. v. Boehing*, 511 F.2d 834 (5th Cir. 1975).

[6,7] 7. The Statute and Canon create a "chilling" and inhibitory effect upon the exercise of plaintiffs' rights of freedom of speech and freedom of association guaranteed by the First Amendment of the United States Constitution. *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L. Ed.2d 22 (1968); *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1970); *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); *National Student Association v. Hershey*, 134 U.S.App.D.C. 56, 412 F.2d 1103 (1969); *Reed v.Giarrusso*, 462 F.2d 706 (5th Cir. 1972); *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed. 2d 659 (1976); *Gray v. City of Toledo*, 323 F.Supp. 1281

(N.D.Ohio 1971). It is widely recognized that freedom of speech as guaranteed by the first Amendment occupies a "preferred position" in our constitutional scheme. See, e.g., *Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); McKay, *The Preference of Freedom,* 34 N.Y.U.L. Rev. 1182 (1959). The reason for such deference is obvious. Without that freedom, all of the other rights guaranteed by our Federal Constitution would be meaningless because without freedom of expression, none of the other rights could be implemented.

[8] 8. The Statute and Canon "chill" and inhibit plaintiff Morial's rights to freedom of speech and freedom of association. Freedom of association and expression are inherent in the process of becoming a candidate for public office. *Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed. 2d 24 (1968); *Lubin v. Panish,* 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); *Mancuso v. Taft,* 476 F.2d 187, 195-98 (1st Cir. 1973); *Hobbs v. Thompson,* 448 F.2d 456 (5th Cir. 1971). Indeed, the right to become a candidate for public office has been held to be a right protected by the First Amendment because the rights of freedom of speech and association are inherent in, and are inextricably intertwined with, the process of becoming a political candidate. Running as a candidate for public office is one means by which these rights are implemented. *Mancuso v. Taft, supra,* at 196; *Williams v. Rhodes, supra; Hobbs v. Thompson, supra.*

[9] 9. The activities embraced by the concept of candidacy, including, but not limited to, public debates, soliciting campaign funds, advocating viewpoints on the political issues of the day, organizing a political party, canvassing supporters, and the distribution of handbills have traditionally been granted First Amendment protection because they implement *both* the rights of freedom of speech and freedom of association. See, e.g., *Whitney v. California,* 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 L. Ed.2d 796 (1973); *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 613, 46 L.Ed.2d 659 (1976); *Mancuso v. Taft, supra; Hobbs v. Thompson, supra; Lecci v. Cahn,* 360 F.Supp. 759 (E.D. N.Y. 1973); *Gray v. City of Toledo,* 323 F.Supp. 1281 (N.D. Ohio 1971).



[10] 10. Freedom to associate encompasses the right to support a candidate of one's choice, to hear that candidate's views on the issues of the day, and to assist in developing support for that candidate. Such freedom contemplates people forming a group which will support the candidate of their choice. This right to form a political party is an integral part of implementing the freedom to associate. All of these actions are also intimately associated with implementing and making effective an individual's rights to freedom of expression. *Williams v. Rhodes, supra; Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed. 2d 92 (1972); *Lubin v. Panish, supra; Mancuso v. Taft, supra;* and *Hobbs v. Thompson, supra.*

[11] 11. The Statute and Canon prohibit only *some,* not *all,* public officials, in the present case Judges, from becoming candidates for nonjudicial office. In evaluating candidacy restrictions for purposes of ascertaining the standard of review, not only must the rights of the potential members of the affected class be considered but also the rights of the public at large. This is so because a restriction upon who may become a candidate inevitably restricts the right to vote.

As stated by Chief Justice Burger in *Bullock v. Carter, supra,* 92 S.Ct. at 856, "The rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." See also, *Mancuso v. Taft,* 476 F.2d 192-94. In the present context, the effect of this candidacy restriction is more than "theoretical" because a uniquely qualified class of public officials is denied the right to freely run as a candidate for a nonjudicial office. This restriction has caused an immediate adverse effect upon *all* voters, including the thirteen plaintiffs and all others who may have made plaintiff Morial their choice in the open primary for the 1977 mayoralty election. These latter voters will be denied the right to vote for the announced candidate of their choice if the Statute and Canon are enforced. *Williams v. Rhodes, supra; Bullock v. Carter, supra; Mancuso v. Taft, supra.*

[12] 12. In evaluating restrictions on candidacy, the function of the Federal Courts is to "examine in a realistic light the extent and nature of their impact on voters." *Bullock v. Carter,* 92 S.Ct. at 856. The Statute and Canon significantly affect the rights of voters because they indirectly and substantially limit the pool of candidates from which a nonjudicial elected official may be chosen. Because these restrictions are directed to only *one* class of potential candidates and because this potential class of candidates is uniquely qualified to serve as public officials because of their training and experience, the Statute and Canon discriminate against the voters and their right to vote by limiting the range and number of potential candidates. *Mancuso v. Taft,* 476 F.2d at 193-94; *Williams v. Rhodes, supra.* Because the Statute and Canon restrict the "fundamental" rights of the thirteen named plaintiffs, such as the right to vote and the



right to work for the candidate of their choice, and their First Amendment rights of freedom of expression and association, these prohibitions substantially affect the rights of this group. *Mancuso v. Taft, supra; Williams v. Rhodes, supra; Bullock v. Carter, supra.*

[13] 13. As stated by the Court in *Harper v. Virginia Board of Elections,* 383 U.S. 663, 666, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169 (1966), "[i]t is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause." By requiring a member of the affected class to choose between becoming an active candidate for a nonjudicial office and resigning or not running at all, the Statute and Canon not only produce a chilling effect upon the exercise of First Amendment rights of *all* the plaintiffs, but also require a Judge to make the extremely difficult choice of either giving up his judgeship or giving up the candidacy. The effect of these prohibitions not only infringes upon the First Amendment rights of freedom of association and freedom of speech, but also significantly inhibits the exercise of these and other interrelated "fundamental" rights of plaintiffs. One obvious way in which resignation infringes upon these rights and "chills" their exercise is by requiring a Judge to give up, perhaps *permanently,* what may be his only source of income *before* that Judge may even officially qualify for the nonjudicial office. La.R.S. 42:39; *Bullock v. Carter,* 405 U.S. at 143, 92 S.Ct. at 849; *Williams v. Rhodes, supra; Mancuso v. Taft,* 476 F.2d at 193-95.

[14] 14. From the above analysis of the law, it is obvious that the right to become a candidate for public office is both a "fundamental" interest and a right inherent in, and intertwined with, the rights of freedom of association and free-

dom of speech protected by the First Amendment. Because of these factors, the "strict scrutiny" mode of equal protection analysis must be applied by the Court. *Bullock v. Carter, supra; Williams v. Rhodes, supra; Lubin v. Panish, supra; Mancuso v. Taft, supra; Hobbs v. Thompson, supra.*

15. The right to run for public office is *not* a "privilege" conferred upon plaintiff by State law as defendants maintain. The case of *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), is relied upon heavily by defendants to support the proposition that public office is a "right" not a privilege. The *Mitchell* case has been drained of much of its vitality by the development of constitutional doctrine within the past quarter century. The deference given by the *Mitchell* Court to legislative judgment concerning restrictions on an individual's First Amendment freedom for the good running of government has not been subscribed to in recent decisions. See, e.g., *Sweezy v. State of New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957); *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842 37 L.Ed.2d 853 (1973); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Hobbs v. Thompson, supra.* See generally Van Alstyne, *The Demise of the Right - Privilege Distinction in Constitutional Law*, 81 Harv. L.Rev. 1439 (1968). As stated in *Elrod v. Burns*, 96 S.Ct. at 2684, "[T]his Court now has rejected the concept that Constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'." It is an accepted fact that government, as an employer, has increased in size so as to become a large scale employer. See, e.g., Emerson, *The System of Freedom of Expression*, 568 (1970); U.S. Bureau of the Census, Statistical Abstract of the United States (1976 Ed.) It is also widely recognized that there has been an enormous increase in the number of laws and regulations which the State must enforce. Together, these factors undermine the argument that government employment is a "privilege". As stated by Van Alstyne, *supra*, at 1461, "[W]ith the increasing size of government as an economic unit . . it is simply no longer true that a particular infringement related to employment by government is no greater than a particular infringement made by a private employer." In *Hobbs v. Thompson*, 448 F.2d at 472-74, the Fifth Circuit refused to accept the right-privilege distinction as set forth in *Mitchell.*



[15] 16. Both the Statute and Canon significantly and substantially burden each of the "fundamental" interests involved in this case and unduly restrict the First Amendment rights of the plaintiffs. Both the Statute and Canon are burdensome to the exercise of these fundamental rights and restrict the exercise of First Amendment freedoms by inhibiting, or curtailing, the exercise of the fundamental rights and the implementation of the First Amendment freedoms. The plaintiffs' fundamental rights to vote and to run for office are burdened because they cannot vote for the announced candidate of their choice and because plaintiff Morial cannot become an announced candidate for the office of Mayor. The First Amendment freedoms of plaintiffs are also substantially infringed upon because plaintiffs are not able to implement their rights to associate in a political campaign thereby making concrete their rights of freedom of expression by having plaintiff Morial, their standard bearer, run for Mayor in 1977. *C.F. Williams v. Rhodes, supra; Bullock v. Carter, supra; Mancuso v. Taft, supra; Hobbs v. Thompson, supra.*

[16] 17. The State has a substantial interest in the regulation of the mode by which these "fundamental" interests and First Amendment Rights are implemented. How-

ever, the regulation of such activity in the area of the First Amendment must be done within the narrow confines of the concept of public order and safety. *Cox v. Louisiana*,379 U. S. 536, 554-55, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). The State may regulate these "fundamental" interests under the equal protection clause of the Fourteenth Amendment only when the State can show that such regulation is necessary to achieve a "compelling" State interest. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *NAACP v. Button*, 371 U.S. 415,83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

[17] 18. The State has a "compelling" interest in not only averting *actual* impropriety, but also in averting the *appearance* of impropriety on the part of the members of its judiciary. The State obviously has such a compelling interest in maintaining the integrity, and the appearance of integrity, of its judiciary as well. See, e.g.,*Friedman v. Court on the Judiciary of New York*, 375 U.S. 10, 84 S.Ct. 70, 11 L.Ed. 2d 40 (1963); *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); *Napolitano v. Ward*, 457 F.2d 279 (7th Cir. 1972). Nevertheless, we conclude that the exclusionary measure taken by Louisiana--a flat prohibition of not being able to seek nonjudicial office by members of the judiciary-- is not a necessary means, or, in fact, even a reasonably necessary means, to effectuate these compelling State interests. As observed by Justice Marshall, "[S]tatutes affecting constitutional rights must be drawn with 'precision'. *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328,340 , 9 L.Ed.2d 405 (1963); *U.S. v. Robel*, 389 U.S. 258, 265, 88 S.Ct. 419, 424, 19 L.Ed.2d 508 (1967)." *Dunn v. Blumstein*, 405 U.S. at 343, 92 S.Ct. at 1003.



19. The Statute and Canon are far too imprecise a means to pursue these "compelling" State interests. The nature of the regulation put forth in the Statute and Canon are unnecessary and ineffective in achieving the articulated objectives of the State. A broad prophylactic prohibition requiring a Judge to resign his position before he becomes a candidate for a nonjudicial office is far too heavy handed a means to achieve judicial integrity and actual propriety as well as the appearance of both. Less heavy handed means exist. Some of those alternatives have been set forth above. Although these proposals were made in the context of an interpretation of Canon 7(A)(3), these alternatives obviously are less restrictive than the provisions of both La.R.S. 42:39 and Canon 7(A)(3) as presently constructed.

20. Assuming that a blanket rule were necessary to achieve compelling State objectives, there has been no demonstration by defendants as to why the prohibitions contained in the Statute and Canon should be directed only to Judges. Similar prohibitions directed to the police departments and to firemen have been struck down, respectively, in the cases of *Mancuso v. Taft, supra*, and *Hobbs v. Thompson, supra*, because the "compelling" State interests did not justify the broad, prophylactic measures employed by the State to protect those interests. We must conclude that Judges *qua* Judges are no different from policemen and firemen in this regard. Although the functioning of our system of law depends a great deal upon how the public views the men who operate that system, it is obvious that the trust of the public is not dependent upon how only one part of that system is viewed. It is not necessary to the accomplishment of the "compelling" interests of the State that *only* Judges be prohibited from exercising certain of their fundamental interests and First Amendment rights simply because they are

Judges when other components of that system are not. *Mancuso v. Taft, supra; Hobbs v. Thompson, supra.*

21. Since candidates for judicial office are subjected to the same political pressures as candidates for nonjudicial offices, and since Judges in seeking election or reelection to other judicial offices are immersed in the political process to the same degree as other elected officials seeking nonjudicial office, the Statute and Canon are not means even "reasonably calculated" to achieve the "compelling" State interests. *Williams v. Rhodes, supra; Bullock v. Carter, supra; Mancuso v. Taft, supra;* and *Hobbs v. Thompson, supra.*

22. Permitting Judges to run for nonjudicial offices does not introduce any additional real or apparent threat to the integrity of the judiciary which does not already exist in a political system where most State Judges are required to stand for election or reelection every six years. Because Judges must stand for election more often, the Statute and Canon are not even reasonably calculated to achieve the compelling State interests of *promoting* integrity and propriety of the judiciary. In addition, the evidence shows that there are no significant differences between a candidate for judicial office, a candidate for reelection to a judicial office, and a candidate for a nonjudicial office. *All* must engage in "politics", such as raising campaign funds and soliciting partisan and nonpartisan political endorsements *before* and during the campaign. *C. F. Williams v. Rhodes, supra; Bullock v. Carter, supra; Mancuso v. Taft, supra;* and *Hobbs v. Thompson, supra.*

23. The Statute and Canon do not articulate any "compelling" reason, other than somehow Judges must be more "pure", or more subject to the *spectre* of seeming, as well as



actual, conflicts of interest simply because they are Judges. While the concept that a Judge must avoid soiling his office by soliciting finances and voter support may be a laudable goal, it ignores the harsh realities of the Louisiana system as presently confected. If there is a basis for holding Judges *qua* Judges to such harsh prohibitions, while at the same time *not* holding other elected officials or candidates for election to similar harsh standards, the State has failed to show it. Because of this, the State has not discharged its burden of demonstrating that the means are "necessary" to protect "compelling" State interests. *Dunn v. Blumstein, supra; Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Harper v. Va. Bd. of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1963).

[18] 24. The Statute and Canon sweep too far into the area of protected freedoms in that both attempt to regulate the ability of Louisiana Judges to run for local office as well as *national* office. As such, they must also fall under the policies of the "Overbreadth Doctrine". This "Overbreadth Doctrine" is based upon the principle that "a government purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Zwickler v. Koota,* 389 U.S. 241, 250, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967); *NAACP v. Alabama ex rel. Flowers,* 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed. 2d 325 (1964). See Note, *The First Amendment Overbreadth Doctrine,* 83 Harv.L.Rev. 844 (1970). As is evident from the foregoing analysis, the Statute and Canon sweep too far because they purport to regulate conduct and qualifications which the State cannot constitutionally regulate, namely, the qualifications for *national* office. See, e.g., *Stack v. Adams,* 315 F.Supp. 1295 (N.D.Fla.1970); *C.F. Powell v.*

*McCormick*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

[19] 25. Plaintiffs will suffer irreparable injury unless the defendants are enjoined from enforcing the unconstitutional provisions of La.R.S. 42:39 and Canon 7(A)(3) of the Code of Judicial Conduct. Plaintiff Morial will be at a distinct disadvantage *vis-a-vis* other candidates for the office of Mayor of the City of New Orleans in the preparation of his campaign. In addition, the other plaintiffs' "fundamental" rights and First Amendment freedoms will be unduly burdened or perhaps even denied unless the prohibitions of the Statute and Canon are enjoined. The Court finds that the plaintiff would be significantly and irreparably harmed by the prohibitions before a decision on the merits could be reached; that the irreparable harm which plaintiffs will suffer outweighs any possible harm that may accrue to the defendants as they have less drastic means of achieving the "compelling" State interests; that plaintiffs have made out a *prima facie* case which indicates that they would succeed on the merits; and finally, that the public interest would best be served by granting the plaintiff preliminary injunctive relief. *A Quaker Action Group v. Hickel*, 137 U.S. App.D.C. 176, 421 F.2d 1111, 1116 (1969); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631 (4th Cir. 1969).



APPENDIX B
Opinion of United States Court of Appeals,
Fifth Circuit

Ernest N. MORIAL et al.,
Plaintiffs-Appellees
v.
JUDICIARY COMMISSION OF the STATE OF LOUISIANA et al.,
Defendants-Appellants

No. 77-1491

United States Court of Appeals, Fifth Circuit.

Dec. 13, 1977

Appeal was taken from a judgment entered in the United States District Court for the Eastern District of Louisiana at New Orleans, 438 F.Supp. 599, Fred J. Cassibry, J., holding unconstitutional a Louisiana statute and canon of judicial conduct requiring judges to resign their position before announcing their candidacy for nonjudicial office. The Court of Appeals, Goldberg, Circuit Judge, held that the statute and canon were violative of neither the First Amendment nor equal protection.

Reversed.

Fay, Circuit Judge, dissented and filed opinion.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY and RUBIN, Circuit Judges.

GOLDBERG, Circuit Judge:

In this appeal, we are asked to rule upon the constitutionality of a Louisiana statute and canon of judicial ethics which have the effect of requiring a judge to resign his seat on the bench in order to run for elective non-judicial office. The issue is one which implicates important interests in political participation and equally important ones in the impartial administration of justice. Upon full consideration of the very difficult and perplexing questions presented, we conclude that the challenged statute and canon are constitutional and, therefore, reverse the district court.

## FACTS

Plaintiff Morial is a judge of the Court of Appeal, Fourth Circuit, State of Louisiana. Judge Morial was interested in becoming a non-party candidate for the office of the Mayor of New Orleans. By letter of October 16, 1976, he requested that the Supreme Court of Louisiana grant him a leave of absence, without pay, from his judicial duties in order that he might conduct a campaign for the mayoralty. Morial's request was made in view of Canon 7(A)(3) of the Louisiana Code of Judicial Ethics which provides:



> A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.[1]

The Louisiana Supreme Court unanimously denied Morial's request for a leave of absence. He then addressed a letter to that court's Committee on Judicial Ethics requesting an advisory opinion on the permissibility of engaging in activities to solicit support for his contemplated campaign.[2] The Committee was unanimously of the view that such activity was prohibited and that Judge Morial would be required to resign before announcing his candidacy.

Judge Morial, joined by thirteen citizen-voters who indicated their support for his candidacy, then brought suit in federal district court seeking a declaration that Canon 7(A)(3) was unconstitutional and enjoining its enforcement. Named as defendants were the Judiciary Commission of the State of Louisiana, its members, the Louisiana Supreme Court, and its members. The plaintiffs also sought a declaration that Lou-

---

1. La.Code of Judicial Conduct Canon No. 7(A)(3) (1975). The Louisiana canon is identical to that recommended by the American Bar Association, *see* ABA Code of Judicial Ethics Canon No. 7(A)(3) (1973), and a similar provision is in force in many states. Appendix I contains a list of such states.

   The analogous federal code contains a similar prohibition. Code of Judicial Conduct for United States Judges Canon No. 7(A)(2) (1973).

2. The Committee is established and given the authority to render advisory opinions by the Code itself. La.Code of Judicial Ethics Committee on Judicial Conduct (1975).

isiana R.S. 42:39, which prohibits any judge, save a justice of the peace, from qualifying for election to any non-judicial office unless he had resigned not less than twenty-four hours prior to the qualifying date, La.Rev.Stat.Ann. §42:39 (Pocket Part 1977), was unconstitutional and prayed for an injunction against its enforcement. The Governor, Attorney General and Secretary of State of Louisiana in their individual and official capacitites were named as defendants in view of their obligation to enforce the "resign-to-run" statute.

[1] The district court granted the plaintiffs' prayer for relief. Judge Cassibry, in a scholarly and penetrating opinion, 438 F.Supp. 599, found that the canon and statute created a "chilling" and inhibitory effect upon the exercise of the plaintiffs' rights of freedom of speech and freedom of association guaranteed by the First Amendment of the United States Constitution. The court concluded that the prohibition of judicial candidacies for non-judicial offices was "not a necessary means, or in fact, even a reasonably necessary means, to effectuate" the admittedly compelling state interest in maintaining the integrity of the judiciary. On these premises, the district court held that the canon and statute violated the first amendment and the equal protection clause of the fourteenth.[3]

---

3. Although oral argument in this case was heard by a three-judge panel of this court, on November 3, 1977 it was determined to decide this case *en banc*. In the order granting defendants' motion for en banc consideration, the en banc court, Judge Fay dissenting, voted to stay the order of the district court pending further order of this court.

Subsequent to the entry of this order but prior to the election held November 12, plaintiff Morial resigned his judgeship. Just prior to and subsequent to the general election, several candidates in the primary and general elections brought suit in state court challenging Morial's right to run. The Louisiana intermediate appellate court held, apparently as a matter of state law, that Morial had properly qualified as a candidate in view of the fact that the operation of the statute which would have barred his candidacy was suspended by the order of the district court in this case. (We have no occasion to consider in this case whether, as a matter of federal law, Louisiana would have been required to give this effect to the district court's order.) By denial of writs in these suits, the Louisiana Supreme Court affirmed that plaintiff Morial was validly a candidate for election. On November 12, 1977, Morial was elected Mayor of New Orleans.

The parties to this suit agree that the case is not moot notwithstanding these events. We concur. Suits challenging the validity of state election laws are classic examples of cases in which the issues are "capable of repetition, yet evading review." The Supreme Court has decided a number of such cases after the challenged election had already taken place and no request for retrospective relief could be granted. *American Party of Texas v. White*, 415 U.S. 767, 770 n. 1, 94 S.Ct. 1296, 1301 n. 1, 39 L.Ed.2d 744,n. 1 (1974); *Storer v. Brown*, 415 U.S. 724, 737 n.8, 94 S.Ct. 1274, 1282 n.8, 39 L.Ed.2d 714 (1974); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969). In none of these cases was the suit brought as a formal class action; nor did the Court pause to consider whether the particular plaintiff would be subject to future harm. In language directly applicable to this case, the *Storer* Court wrote,

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candi-



JURISDICTION

[2,3] Defendants urge that the district court should have dismissed this suit for lack of subject matter jurisdiction. They assert that any threat to the plaintiffs' interests was purely hypothetical and speculative when the complaint was filed and thus did not give rise to a justiciable case or controversy. We cannot agree. The court's power to adjudicate a case arising under 42 U.S.C. §1983, pursuant to jurisdiction conferred by 28 U.S.C. §1343(3) and 28 U.S.C. §§2201-2202, is not conditioned upon a plaintiff's actually proceeding to violate some assertedly unconstitutional state law prior to bringing suit in federal court. Pre-conduct challenges to the validity of laws burdening first amendment rights are among the essential bulwarks of a system of free expression.

*See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Dombrowski v. Pfister*, 380 U.S. 479, 490, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). While courts have an interest in having concrete factual situations presented for judicial consideration, this interest would not be advanced by withholding anticipatory relief where, as here, the course of conduct in which the plaintiff plans to engage is clear to the court at the time the suit is filed. Indeed, in the case at bar, just as in *Steffel*, the plaintiff outlined his anticipated course of conduct with sufficient clarity to the state enforcement authorities to enable them to determine that his conduct would violate the state rule and expose him to sanctions. In such circumstances, the threat of punishment for engaging in protected activity cannot be characterized as "imaginary or speculative," *cf. Younger v. Harris*, 401 U.S. 37, 41, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

---

dacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is 'capable of repetition yet evading review.'"

*Storer v. Brown, supra*, 415 U.S. at 737 n. 8, 94 S.Ct. at 1282, n.8; *Cf Magill v. Lynch*, No. 76-1532, 560 F.2d 22, at 25 n. 1 (1st Cir. 1977) (election case decided after election not moot on a different theory). The effects of the Louisiana statute on judicial candidacies, too, will persist as it is applied in future elections.

While at one time it seemed that the *Storer* approach had been cast aside by the Court in *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L. Ed.2d. 532 (1975), *see Henderson v. Fort Worth Independent School District*, 526 F.2d 286, 288-89 n.1 (5th Cir. 1976), a case decided last term demonstrates that *Storer* retains full vitality. In *Mandel v. Bradley*, ___ U.S.___, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977) (per curiam), the Court held, citing *Storer*, that a challenge to a Maryland candidate qualification requirement was not moot notwithstanding the fact that the plaintiff had, while under the protection of a district court injunction, "successfully gathered the requisite number of signatures, obtained a place on the ballot, ran and lost" prior to the Court's decision. *Id.*, ____U.S. at ____ , 97 S.Ct. at 2239 n.1. *Mandel* was not brought as a class action. We believe that this pronouncement of the



[4-7] Defendants also urge that principles of comity and federalism bar a federal court from entertaining a claim by a member of a state's judiciary regarding a question of judicial administration. *Younger* principles, even were we to assume them applicable to disciplinary proceedings against a judge, *see generally, Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), have no application where state proceedings have not been initiated prior to substantial proceedings on the merits in federal court. *Hicks v. Miranda*, 422 U.S. 332, 349, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). *Younger* principles are not invoked by the mere fact that federal relief has an impact upon state governmental machinery; even in its quasi-criminal extensions, *Younger* dismissal is called for only in those circumstances where successful defense of a state enforcement proceeding, initiated before substantial federal proceedings on the merits had occurred, would fully vindicate the federal plaintiff's federal right. *Younger, supra*, 401 U.S. at 49, 91 S.Ct. 746; *Steffel, supra*, 415 U.S. at 460-61, 94 S.Ct. 1209; *Gibson v. Berryhill*, 411 U.S. 564, 577 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973); *Huffman, supra*, 420 U.S. at 603, 95 S.Ct. 1200;

---

Supreme Court in a case so very closely analogous to that at bar must govern. The pace of reasoned constitutional adjudication, these cases show, is not parametric with that of election campaigns. But *cf. De Funis v. Odegaard*, 416 U.S. 312, 317, 94 S.Ct 1704, 40 L.Ed.2d 164 (1974) (future suits challenging university admissions program would not evade review because state court's holding in instant case would expedite process of appellate review). See Note, *Mootness in the Supreme Court*, 88 Harv.L.Rev. 373, 392-95 (1974).

*Juidice, supra,* 430 U.S. at 334, 338, 97 S.Ct. at 1217, 1218. The *Younger* principles simply are not what the defendants would have them be:a broad, discretionary, device for the evasion of the responsibility of federal courts to protect federal rights from invasion by state officials.

## I. THE FIRST AMENDMENT CLAIMS[4]

[8] In judging the constitutional validity of Louisiana's rule that judges resign their offices prior to becoming candidates for non-judicial office, this court must be guided by the approach adopted by the Supreme Court in *U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) and *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), the so-called "Hatch Act" cases. In these cases, the Court upheld against constitutional challenge broad restrictions upon the political activity of federal and state civil service employees. 413 U.S. at 556, 93 S.Ct. 2880; 413 U.S. at 616-17, 93 S.Ct. 2908. The Court specifically approved restrictions on the right of a federal civil servant to be "a partisan candidate for . . an elective public office," *Letter Carriers, supra,* 413 U.S. at 556, 93 S.Ct. at 2886, and on the right of state civil servants to become "candidates for any paid public office . . .," *Broadrick, supra,* 413 U.S. at 616-17, 93 S.Ct. at 2918. It is evident that the central issue in the resolution of the first amendment claims in the case at bar is the applicability of these conclusions to a sitting judge who intends to run for non-judicial office.

4. The plaintiffs' claims under the first and fourteenth amendments present substantially identical issues. Nonetheless, we treat the first amendment claim separately from the equal protection claim in order later to highlight more readily certain aspects of the challenged state rule arising out of Louisiana's special treatment of judges seeking election to non-judicial office.



Correct extrapolation of the *Letter Carriers* and *Broadrick* decisions requires careful attention to the Court's analysis. Some lower courts have characterized these cases as employing a "balancing test." *Alderman v. Philadelphia Housing Authority,* 496 F.2d 164, 171 n. 45 (3rd Cir. 1974); *Magill v. Lynch,* No. 76-1532, 560 F.2d 22, at 27 (1st Cir. 1977). To the extent that the term "balancing" implies that the decision in *Letter Carriers* turned entirely on the relative importance the Court ascribed to the governmental interests and those of the employees, we find the word misleading. The analysis was actually more complex. As a first step the Court articulated the interests of the employees in being free of the challenged restriction. 413 U.S. at 564-68, 93 S.Ct. 2880. The Court observed that while the Hatch Act admittedly burdened some activity implicating first amendment values, its prohibitions were far from universally applicable in that only certain partisan activity was proscribed. The employees were free to engage in many other forms of political expression. *Id.* at 576, 93 S.Ct. 2880. The Court then articulated each of the important governmental interests in protecting the integrity of its civil service and examined the closeness of fit between these governmental interests and the Hatch Act prohibitions. *Id.* It is this means-end scrutiny which is obscured by incautious description of the *Letter Carriers* approach as a simple "balancing test."

The Court in *Letter Carriers* did not require that the means-end fit be perfect. Rather, it held that Congress could constitutionally restrict political activity by subordinate employees in order to prevent coercion by their superiors; the legislature did not have to rely upon a prohibition against coercion alone, a less restrictive and arguably effective alternative to the measure enacted. *Id.* at 566-67, 93 S.Ct. 2880. On the other hand, it is clear that the Court was not and

could not be satisfied with a means-end relation that was merely rational in view of the Hatch Act's impact on first amendment values. *See Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673; 2684-85, 49 L.Ed.2d 547 (1976); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 637-38, 46 L.Ed.2d 659 (1976). Indeed, the *Letter Carriers* opinion makes prominent and particular mention of the substantial body of expert opinion, available to Congress at the time it considered the Hatch Act, supporting the reasonableness of Congress' view that a simple ban on coercion would be ineffective. 413 U.S. at 566-67, 566 n.12, 93 S.Ct. 2880. Such support would hardly be necessary to sustain a statute if tested against a standard of mere rationality.

The Supreme Court's utilization of different standards of scrutiny in cases involving the first amendment rights of public employees, compare *Letter Carriers, supra* with *Elrod v. Burns, supra* and *Buckley v. Valeo, supra*, can be reconciled only by concluding that the requisite closeness of the means-end relation must be determined on a case-by-case basis. The standard to be applied in any case is a function of the severity of impairment of first amendment interests. As the burden comes closer to impairing core first amendment values, e.g. the right to hold particular political views, *Elrod v. Burns, supra*, 427 U.S. at 355, 96 S.Ct. at 2681, or impairs some given first amendment value more substantially, *Buckley v. Valeo, supra*, 424 U.S. at 19-23, 96 S.Ct. at 635-36, the requisite closeness of fit of means and end increases accordingly. The teaching of *Letter Carriers*, considered as a part of the jurisprudence of the first amendment and not some anomalous class of "Hatch Act cases," is that restrictions on the partisan political activity of public employees and officers, where such activity contains substantial non-speech elements, *see United States v. O'Brien*, 391 U.S. 367,



88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), are constitutionally permissible if justified by a reasonable necessity, *see Bullock v. Carter*, 405 U.S. 134, 144, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), to burden those activities to achieve a compelling public objective.[5]

A. *The Plaintiffs' Interests*

Our analysis of the impact of the Louisiana rule upon the first amendment interests of the plaintiffs convinces us that

---

5. We recognize, of course, that the Supreme Court has not articulated the applicable test in precisely this way. Nonetheless, the Court's reasoning and its holdings in cases closely analogous to that at bar support the appropriateness of a variable standard of scrutiny dependent upon the character and substantiality of the impairment of first amendment interests.

In *Elrod v. Burns, supra*, the Court invalidated an Illinois system of patronage dismissals. The plurality insisted that the state employ the least intrusive means of achieving its objective. 427 U.S. at 361-365, 96 S.Ct. at 2684-85. In contrast, the *Letter Carriers* majority used some less exacting standard. *U.S.C.S.C. v. National Ass'n of Letter Carriers*, 413 U.S. 548, 596-99, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (Douglas, J., dissenting). In *Buckley v. Valeo, supra*, the per curiam portion of the decision, using a single form of words to describe the test, reaches different results on the constitutionality of the federal limit on campaign contributions and campaign expenditures, 424 U.S. 1, 96 S.Ct. 612, 640, 647, 46 L.Ed.2d 659 (1976), a difference premised largely upon the "markedly greater burden on basic freedoms" imposed by the expenditure limit. *Id.*, 424 U.S. at ——96 S.Ct. at 647. In still other cases the Court has employed a means-end test, *see Bates v. State Bar of Arizona, ——U.S.—— ——,97 S.Ct. 2691, 2701-07, 53 L.Ed.2d 810 (1977); Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 1828-30, 48 L.Ed.2d 346 (1976), without explicitly articulating the constitutionally requisite closeness of the fit between the state's chosen end and means. Cases dealing with candidacy restrictions based on filing fees, past or present levels of support, and durational residency requirements have also used a variety of standards of scrutiny. *See Woodward v. City of Deerfield Beach*, 538 F.2d 1081, 1082 n. 1 (5th Cir. 1976) for a review of this difficult jurisprudence. The concordance of these discordant canons of constitutional adjudication can best be accomplished, we believe, by the adoption of the approach discussed in the text.

the reasonable necessity standard extracted from *Letter Carriers* is appropriate in this case. We begin that analysis by detailing the affected interests, noting that the arithmetic of constitutional adjudication of restrictions upon candidacy requires the court to sum the affected interests of plaintiff Morial and the plaintiffs who would support him but for the canon's bar. *Bullock v. Carter,* 405 U.S. 134, 142-44, 92 S. Ct. 849, 31 L.Ed.2d 92 (1972). As to the former, we are enjoined to recall that the Supreme Court has not declared a right to candidacy fundamental, *id.* at 143, 92 S.Ct. 849; *see Magill v. Lynch, supra,* (disapproving *Mancuso v. Taft,* 476 F.2d 187 (1st Cir. 1973)). As to the latter, "it is essential to examine in a realistic light the extent and nature" of the Louisiana rule's impact upon voters. *Bullock v. Carter,* 405 U.S., at 143, 92 S.Ct., at 856.

Judge Morial's interest in being free to run for Mayor while retaining his seat on the bench is substantial. The canon and statute heavily burden a decision to become an active candidate for non-judicial office by forcing a judge to resign a remunerative position of considerable prestige and power merely in order to run. Relegating one's robes to the closet is a heavy price to pay for tossing one's hat in the ring.

This burden, moreover, weighs upon the exercise of an important, if not constitutionally "fundamental," right. Candidacy for office is one of the ultimate forms of political expression in our society. The citizen deeply committed to the triumph of an idea or program can equally be the citizen devoted to the representation of that idea or the implementation of that program. *See Mancuso v. Taft, supra.*

The first amendment interest of Judge Morial which the Louisiana rules leave unaffected must also be considered,



however, in order to judge the substantiality of the impairment. Louisiana's resign-to-run requirement does not burden the plaintiff's right to vote for the candidate of his choice or to make statements regarding his private opinions on public issues outside a campaign context; nor does it penalize his belief in any particular idea. These are core first amendment values. *See U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers,* 413 U.S. at 556, 575-76, 93 S.Ct. 2880; *Buckley v. Valeo,* 424 U.S. at 19-23, 96 S.Ct., at 635-36; *Elrod v. Burns,* 427 U.S., at 355-359, 96 S.Ct., at 2681-82; *Alderman v. Philadelphia Housing Authority,* 496 F.2d 164 (3rd Cir. 1974), *cert. den.,* 419 U.S. 844, 95 S.Ct. 77, 42 L. Ed.2d 72 (1974). Even in its limited sphere of operation, the Louisiana rule is administered in such a manner as to mitigate somewhat the deterrent effect of the resignation requirement. The letter which informed Judge Morial that Canon 7(A)(3) barred him from active candidacy while still a judge also informed him that the canon did not prohibit preliminary surveys of financial and voter support. In other words, the canon does not require a prospective candidate to balance a secure judgeship against a complete leap in the dark. The prospective candidate need not resign merely to learn whether he has a realistic chance of election.

The impact of the resign-to-run requirement upon voters is even less substantial. Where candidacy restrictions have been invalidated on constitutional grounds the effect of the restriction was to exclude candidates of an identifiable group or viewpoint, e.g., the poor, *Lubin v. Panish,* 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974), *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), *Turner v. Fouche,* 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), or minority parties, *Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). While we would be the last to deny

that Louisiana state judges have qualities of talent and experience which make them attractive candidates for non-judicial office, excluding the class of judges cannot be said to have a major impact upon the availability of candidates to represent any particular group or viewpoint. Exclusion of judges from the pool of prospective candidates cannot be supposed to have a qualitatively different effect on the interests of voters than the analogous exclusion of equally talented and experienced federal and state civil servants, an exclusion which the Supreme Court found constitutional in *Letter Carriers* and *Broadrick*.

The impairment of the plaintiffs' interests in free expression and political association stemming from enforcement of the resignation rule is thus not sufficiently grievous to require the strictest constitutional scrutiny. *U. S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 566-67, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *Magill v. Lynch*, No. 76-1532, 560 F.2d 22, at 27-28 (1st Cir. 1977). Neither is the impairment insubstantial or innocuous; a level of scrutiny which guarded against only those measures offending logic would be a gratuitous insult to the seriousness of the interests involved in becoming or supporting a candidate for public office. *See Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Woodward v. City of Deerfield Beach*, 538 F.2d 1081, 1082 n. 1, 1083 (5th Cir. 1976). Instead, we should employ a level of scrutiny which requires the state to show a reasonable necessity for requiring judges to resign before becoming candidates for elective non-judicial office. *See Lubin v. Panish*, 415 U.S. 709, 718, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); *Bullock v. Carter*, 405 U. S. 134, 144, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).



B. *The State's Interests and Their Relation to the Resign-to-Run Rule*

Having determined that Louisiana's resign-to-run rule must meet the test of reasonable necessity, we now turn to the articulation of the state's interests to see whether the rule is reasonably necessary to effectuate those interests. Louisiana vigorously defends the resignation requirement as a measure designed to insure the actual and perceived integrity of state judges. The specific evils targeted are three. First, the state wishes to prevent abuse of the judicial office by a judge-candidate during the course of the campaign. The state also wishes to prevent abuse of the judicial office by judges who have lost their electoral bids and returned to the bench. Finally, Louisiana asserts an interest in eliminating even the appearance of impropriety by judges both during and after the campaign.

That these are interests grave and honorable, none can doubt. The government has at least as great an interest in assuring the impartiality of judicial administrastion of the laws as in assuring the impartiality of bureaucratic administration of the laws. *See U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564-65, 93 S.Ct. 2880, 37 L.Ed.2d 796. As the Supreme Court has observed, the reality and the appearance of "political justice" are incompatible with the assumptions of a system of government of laws not men. *Id.* Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues. The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect. *Cf. United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed. 2d

1039 (1974).[6]

The resign-to-run rule is reasonably necessary to the state's vindication of these interests. By requiring a judge to resign at the moment that he becomes a candidate, the state insures that the judge will not be in a position to abuse his office during the campaign by using it to promote his candidacy. The appearance of abuse which might enshroud even an up right judge's decisions during the course of a hard-fought election campaign is also dissipated by requiring the judge to resign. He who does not hold the powers of the office cannot abuse them or even be thought to abuse them.

Even clearer is the reasonable necessity of the resignation requirement to the prevention of post-campaign abuse or its

---

6. Plaintiffs argue that Louisiana has largely disavowed these interests in insulating judges from political influence by providing for an elected judiciary. In view of this disavowal, the argument continues, Louisiana's interests cannot be of sufficient constitutional weight to overcome the plaintiffs' first amendment rights.

This argument raises questions that are best considered in the context of the equal protection analysis of the Louisiana rule. In effect, plaintiffs attack the permissibility of requiring judges who wish to run for non-judicial office to resign while permitting those who wish to run for judicial office to retain their seats. Framed in this manner, the thrust of plaintiff's argument is directed at the legislative classification, the traditional focal point of equal protection analysis. *See* Part II, *infra.*

We pause, nonetheless, to reject the implied premise of the plaintiffs' argument, i.e., that unless the state exercises the full extent of its power to prevent some evil, the state's interest in preventing that evil cannot be considered constitutionally weighty. To take an obvious example, the Supreme Court in *Buckley v. Valeo* recognized that the government's interest in preventing undue influence upon elected officials was sufficiently important to justify the regulation of campaign contributions, 424 U.S., at 29, 96 S.Ct. at 640, notwithstanding the obvious fact that Congress has never attempted to eradicate every possible source of such influence.



appearance. It is apparent that the prevention of post-campaign abuse calls for measures which are effective in the post-campaign period. A leave of absence for the duration of the campaign wholly fails to meet this requirement of post-campaign effectiveness; the state cannot be constitutionally faulted for failing to provide Judge Morial with a leave of absence. Moreover, the standard of reasonable necessity does not require the state to place entire reliance upon post-campaign measures such as disciplinary proceedings against judges who used their offices improperly or strict rules of recusal, both of which are designed to target perfectly those situations where the dangers of abuse or its appearance are greatest. As we have shown, the "reasonable necessity" test permits a degree of prophylaxis, particularly where the state has an interest in avoiding the appearance of impropriety. *U. S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers,* 413 U.S. 548, 566-67, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *see Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 638-39, 46 L.Ed.2d 659 (1976). As a constitutional matter, we cannot say the prophylaxis here is an excess of caution. The common-sense conclusion that the resignation requirement makes a substantial contribution to the achievement of the state's ends is reinforced by the widespread adoption of the canon.[7] Louisiana's canon and statute do not violate the first amendment.[8]

---

7. See Appendix I.

The Louisiana Code of Judicial Conduct was adopted by the Louisiana Supreme Court pursuant to its rule-making authority under the most recent version of the Louisiana constitution. LaConst. art. V, §5. The fact that judges adopted a restriction upon judges may also be of constitutional significance. *See Ely, The Constitutionality of Reverse Discrimination,* 41 U.Chi.L.Rev. 723,734-36 (1974).

8. Our conclusion on this issue does not disregard the fact that Judge Morial did not intend to run as a party representative. As the plaintiffs correctly point out, much of the language in *Letter Carriers* pointedly

II. *The Equal Protection Claims*

[9] The plaintiffs couch their complaint in the language of the equal protection clause of the fourteenth amendment as well as in the language of the first. While it is true that a first amendment claim typically takes the form of an assertion that the government cannot deprive the plaintiff of some freedom and an equal protection claim takes the form of an assertion that the government may not single out the class of which the plaintiff is a member for deprivation, it is equally true that every first amendment claim can be transformed into an equal protection claim merely by focusing upon the classification that every legislative scheme embodies. It is, therefore, generally appropriate to employ the same standard of scrutiny to the derivative equal protection claim as would be applied to the underlying claim of a substantive deprivation.[9] *See American Party v. White*, 415 U.S. 767, 778, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The *method* of equal protection analysis, however, retains independent worth even in such cases. Highlighting the legislative classification serves to illumine the state's interest in burdening those of the plaintiff's class and the necessity of doing so in order to advance that interest.

limited the Court's holding to an adjudication of the validity of prohibitions on partisan political activity. 413 U.S., at 556, 93 S.Ct., at 2886. In the context of the Hatch Act which regulates the activities of federal employees, it was natural for the Supreme Court to discuss the dangers of partisanship as if they were substantially identical to the dangers of *party* domination. *Id.* at 564-68, 93 S.Ct. at 2889. We do not believe, however, that the restrictive language of *Letter Carriers* requires courts to ignore the reality of partisanship if the formality of party affiliation is absent. *Magill v. Lynch*, No. 76-1532, 560 F.2d 22 (1st Cir. 1977). A faction may form around a man as much as around a party label; the judicial office may be abused by using it to promote the interest of a faction as well as a formal party. Moreover, the record in this case demonstrates that formal party and political organizations with defined constituencies play a major role in New Orleans mayoralty campaigns, endorsing candidates, distributing sample ballots, and otherwise promoting the election of favored candidates. Thus, the mere fact that plaintiff Morial's name would appear on the ballot without party designation does not render the state powerless to require his resignation from the bench. *Id.* We do not mean to say that legislatures are necessarily equally free to restrict formally partisan and formally nonpartisan conduct. In any given case, the relevant inquiry must be whether the threat to the state's interests in the impartiality of its public servants stems from *party* involvement or from political involvement.



The nub of the equal protection problem in the present case is that judges running for election to non-judicial office are singled out. The state makes two classifications. First, any judge may run for judicial office without resigning his seat on the bench. A classification is thus established between judges who wish to run for judicial office and judges who wish to run for non-judicial office. Moreover, anyone other than a judge may run for non-judicial office without resigning the office he holds at the time he announced his candidacy. A second classification is thus established between judges and all other office holders. The constitutional problem is to determine whether these classifications are reasonably necessary to the vindication of Louisiana's interest in the integrity of its elected judiciary.

The district court made formal findings of fact on the conduct of judicial and non-judicial elections in Louisiana. The most important of these findings were that the conduct of political campaigns for the judicial and non-judicial offices were similar and that, when judges run for re-election or election to another judicial office, they "raise money, engage in

9. Of course, if the legislative scheme embodies a classification which is itself constitutionally suspect, strict constitutional scrutiny is required without regard to the nature of underlying deprivation. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 371-73, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

political oratory, make campaign promises, appeal to various political and racial groups, advertise in the media, and run under political party labels in the same way as do other candidates running for non-judicial office." (Finding of Fact 21). Newspaper headlines and campaign oratory describe the political affiliations and ideologies of candidates for judicial office. The district court concluded that "viewed against the reality of the full involvement in politics, then there is no rational basis for thus distinguishing between Judges who run for reelection or for a higher judicial office and Judges who run for nonjudicial office." (Finding of Fact 31).

While these findings make this a difficult and troublesome case, we do not think they are determinative of the constitutional issue. The equal protection clause of the constitution does not put the states to the choice of foregoing an elective judiciary or treating candidates for judicial office like candidates for all other elective offices. The Louisiana constitution, like the federal constitution, creates a separate judicial branch. Article V of the Louisiana constitution is devoted entirely to the functions and duties of that branch. The structure, powers, duties, and emoluments of the state's judiciary are treated differently from those of "Public Officials," who are dealt with in a separate article of the constitution, article IX.

Because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind. For example the contours of the judicial function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns for most non-judicial offices. A candidate for the mayoralty can and often should announce his determination to effect some program, to reach a particular result on some



question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. Not so the candidate for judicial office. He cannot, consistent with the proper exercise of his judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result.[10] Moreover, the judge acts on individual cases and not broad programs. The judge legislates but interstitially; the progress through the law of a particular judge's social and political preferences is, in Mr. Justice Holmes' words, "confined from molar to molecular motions." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221, 37 S.Ct. 524, 531, 61 L.Ed. 1086 (1916) (Holmes, J., dissenting).

As one safeguard of the special character of the judicial function, Louisiana's Code of Judicial Conduct bars candidates for judicial office from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;" La. Code of Judicial Conduct Canon No. 7(B)(c).[11] Candidates for non-judicial

10. The district court recognized that this sketch represents accurately the judicial landscape of Louisiana notwithstanding the regularity of hotly contested judicial elections. Judge Cassibry wrote, "None of these findings should be construed as accusing any State Judge of being politically motivated in any decision he might render. Without exception, I am convinced that they decide their cases freely and impartially based on the law and evidence." (Finding of Fact 30).

11. The district court made no finding explicitly directed to the question of whether this canon is ordinarily observed in the conduct of campaigns for judicial office in Louisiana. Our own review of the exhibits consisting of newspaper articles and advertisements by candidates for judicial office revealed that most such articles and advertisements confined themselves to statements of the education and professional attainments of the candidates.

office are not subject to such a ban; in the conduct of his campaign for the mayoralty, an erstwhile judge is more free to make promises of post-campaign conduct with respect both to issues and personnel, whether publicly or privately, than he would be were he a candidate for re-election to his judgeship. The state may reasonably conclude that such pledges and promises, though made in the course of a campaign for non-judicial office, might affect or, even more plausibly, appear to affect the post-election conduct of a judge who had returned to the bench following an electoral defeat. By requiring resignation of any judge who seeks a non-judicial office and leaving campaign conduct unfettered by the restrictions which would be applicable to a sitting judge, Louisiana has drawn a line which protects the state's interests in judicial integrity without sacrificing the equally important interests in robust campaigns for elective office in the executive or legislative branches of government.

This analysis applies equally to the differential treatment of judges and other office holders. A judge who fails in his bid for a post in the state legislature must not use his judgeship to advance the cause of those who supported him in his unsuccessful campaign in the legislature. In contrast, a member of the state legislatute who runs for some other office is not expected upon his return to the legislature to abandon his advocacy of the interests which supported him during the course of his unsuccessful campaign. Here, too, Louisiana has drawn a line which rests on the different functions of the judicial and non-judicial office holder.[12]

12. It might be argued that Louisiana's interest in protecting the real and apparent integrity of its sitting judges is threatened as much by permitting politically involved persons to run for judicial office as it would be by allowing judges who became politically involved during the course of a campaign for non-judicial office to return to the bench after suffering electoral defeat. A mayor who runs for the judiciary and wins may carry commitments to the bench at least as strong as a judge who runs for the mayoralty and loses. A rule which permits the first threat to become actual while preventing the seond might seem irrational.

The argument proves too much. As just stated, it would apply equally to elective and appointive judiciaries. A mayor who is appointed to a judgeship has had the same experience prior to the campaign as the mayor who is elected to a judgeship. Since the influences and commitments to which this argument is addressed are those incurred outside the judicial campaign context, the only way for the state to vindicate its interest would be to bar anyone with prior political exposure from judicial office, a rule as absurd as it is constitutionally suspect.



Nothing in the case law convinces us that this conclusion is incorrect. In fact, such indications as are found reinforce the validity of our analysis. In *Broadrick*, the Supreme Court summarily disposed of the employees' equal protection claim that the Oklahoma statute impermissibly singled out classified civil service employees for restrictions on partisan political expression. The Court stated,

> In any event, the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. *See McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). And a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.

413 U.S. at 607 n. 5, 93 S.Ct. at 2913. Several lower federal courts have rejected equal protection challenges similar to that pressed here. *Perry v. St. Pierre*, 518 F.2d 184 (2d Cir. 1975); *Stack v. Adams*, 315 F.Supp. 1295 (D.Fla.1970); *Deeb v. Adams*, 315 F.Supp. 1299 (D. Fla. 1970); *see also Holley v. Adams*,238 So.2d 401 (Fla. 1970).

On principle and precedent, we find the Louisiana canon and statute constitutional. Though the questions presented

here are difficult ones, we are confident of the validity of our conclusions.

*Conclusion*

The interests of public employees in free expression and political association are unquestionably entitled to the protection of the first and fourteenth amendments. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Nothing in today's decision should be taken to imply that public employees may be prohibited from expressing their private views on controversial topics in a manner that does not interfere with the proper performance of their public duties. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971). In today's decision, there is no blanket approval of restrictions on the right of public employees to become candidates for public office. *See Magill v. Lynch*, No. 76-1532, 560 F.2d 22 (1st Cir. 1977); *see generally Developments in the Law Elections*, 88 Harv.L.Rev. 1111, 1121-50, 1217-33 (1975); Gordon, *The Constitutional Right to Candidacy*, 91 Pol.Sci.Q. 471 (1976). Nor do we approve any general restrictions on the political and civil rights of judges in particular. Our holding is necessarily narrowed by the methodology employed to reach it. A requirement that a state judge resign his office prior to becoming a candidate for non-judicial office bears a reasonably necessary relation to the achievement of the state's interest in preventing the actuality or appearance of judicial impropriety. Such a requirement offends neither the first amendment's guarantees of free expression and association nor the fourteenth amendment's guarantee of equal protection of the



laws. The judgment of the district court is therefore reversed and the mandate shall issue forthwith.

REVERSED.

Appendix I to follow.

## APPENDIX I

The following states have adopted rules of judicial conduct substantially identical to Louisiana's Canon 7(A)(3). Unless otherwise indicated, the canon is numbered 7(A)(3) in each code.

States marked with an asterisk have been identified by the American Judicature Society as having have adopted Codes of Judicial Conduct based on the A.B.A. Code or its predecessor.

| | |
|---|---|
| ALABAMA* | |
| ALASKA | Alaska Stat., Rules of Court Procedure and Administration |
| ARIZONA | 17A Ariz. Rev. Stat. Ann., Sup.Ct. R. 45 (Pocket Part 1977) |
| COLORADO | 7 Colo. Rev. Stat., Code of Judicial Conduct (1973) |
| CONNECTICUT | Kaye, Mollier, 1 Conn.Prac., Code of Judicial Conduct (Pocket Part 1977) |
| DELAWARE | 16 Del. Code Ann., Del. Judge's Code of Judicial Conduct (1975) |
| DISTRICT OF COLUMBIA | |
| FLORIDA | Fla. Rules of Court, Code of Judicial Conduct (1975) |



| | |
|---|---|
| GEORGIA | 9A Ga.Code Ann. § 24-3642 (1976); *see* 231 Ga. A1-A29; (1973); 232 Ga. 897 (1974) |
| HAWAII* | |
| IDAHO* | |
| ILLINOIS* | |
| INDIANA* | |
| IOWA | 40 Iowa Code Ann. § 610 App.Code of Judicial Conduct (Rule 119) |
| KANSAS | 7 Kan.Stat.Ann. § 20-175, Sup.Ct. R. 601 (1974) |
| MARYLAND | 9C Md.Code Ann., Rule 1231 (1977) |
| MICHIGAN | Mich. Court Rules, Code of Judicial Conduct (1977) |
| MINNESOTA | Minn. Rules of Court, Code of Judicial Conduct (1977) |
| MISSOURI | Mo. Rules of Court, Rule 2, (1977) |
| NEBRASKA* | |
| NEVADA | 1 Nev.Rev. Stat., Sup.Ct. R. 235 (1977) |
| NEW JERSEY | Rules Governing the Courts of N.J., Code of Judicial Conduct, Canon 7(A)(2) (1977) |

NEW MEXICO 4 N.M. Stat. Ann. § 16-11 (Pocket Part 1975)

NEW YORK 29 N.Y. [Jud.App.] Law (McKinney), Code of Judicial Conduct (1975)

NORTH CAROLINA 4A N.C. Gen.Stat.App. VIIIA (1975)

NORTH DAKOTA*

OHIO Rules Governing the Court of Ohio, Code of Judicial Conduct (1977)

OKLAHOMA Okla. Court Rules & Proc., Code of Judicial Conduct (1976)

OREGON*

PENNSYLVANIA Pa. Rules of Court, Code of Judicial Conduct (1977)

RHODE ISLAND 2B R.I. Gen.L., Canons of Judicial Ethics, Canon 27 (1976)

SOUTH DAKOTA 7 S.D. Compiled Laws Ann. § 16-2-App. (Pocket Part 1977)

TENNESSEE 1 Tenn. Code Ann., Sup. Ct.R. 43 (Supp. 1976)

TEXAS 1A Tex.Rev.Liv.Stat.Ann. Title 14, App. B (Vernon) (Pocket Part 1976)

UTAH*



VERMONT Vt. Stat.Ann. § 12 App. VIII, A.O. 10 (Pocket Part 1977)

VIRGINIA*

WEST VIRGINIA 1 W.Va.Code App., Code of Judicial Conduct (Pocket Part 1977)

WISCONSIN Wis. Stat. Ann. § 256 App., Code of Judicial Conduct, Rule 3 (West) (1971)

*Source: Am. Judicature Soc'y, Resource Materials for 5th National Conference of Judicial Disciplinary Commissions, Table No. 5 (1976).

* * * *

FAY, Circuit Judge, dissenting.

With the greatest respect for the en banc decision, I feel compelled to dissent. Seldom has this Court been presented with issues more complex and important than the ones before us today. In his usual scholarly fashion, Judge Goldberg has astutely illustrated that the law which we are to apply is in a state of flux, and that reconciling the plethora of cases in this field is near to impossible. For that reason alone, it is difficult for me to quarrel with whether or not the tests which he proposes should govern the issues before us. A review of the relevant case law has brought to my attention no better way to handle these issues.

I interpret the Court's First Amendment test to be that state restriction on political activities of public employees (where such activities contain substantial nonspeech ele-

ments) is constitutionally permissible if the state has a compelling interest, and the challenged restriction if *reasonably necessary* to further that compelling interest. Majority opinion pp. 1327-28 *supra*. The majority then proceeds to adopt the same standard of review for its equal protection analysis. Majority opinion p. 1332 *supra*.

My problem with this case revolves around the equal protection issues – and my concern is not with the test which the majority adopts, but rather in the application of this test. Judge Goldberg correctly points out that the equal protection problem in the present case is that judges running for election to non-judicial office are singled out. The state makes two classifications. First, any judge may run for judicial office without resigning his seat on the bench. A classification is thus established between judges who wish to run for judicial office and judges who wish to run for non-judicial office. Moreover, anyone other than a judge may run for non-judicial office without resigning the office he holds at the time he announced his candidacy and qualifies.[1] A second classification is thus established between judges and all other office holders. Therefore, if we apply the test proposed by the majority, the issue to be determined is whether these classifications are *reasonably necessary* to the admitted compelling interest Louisiana has in maintaining the integrity of its judiciary.

These classifications are troublesome. There appears to me to exist no legitimate reason to distinguish between judges who run for judicial office and judges who run for non-judicial office. Judge Cassibry in his findings of facts, 438 F.Supp. 599, stated that:

1. The Governor of Louisiana could hypothetically run for any other elected position while holding office.



> No differences have been shown to exist between the conduct of a political campaign for a judicial office and the conduct of a political campaign for a non-judicial office, and the evidence in the record supports the contention that such campaigns are conducted in the same ways.

What Judge Cassibry's finding means is that since judicial and non-judicial elections are conducted in the same manner, a judge who runs for any other judicial office is subjected to the same potential corrupting influences as would be a judge who runs for any non-judicial office. Why then is it reasonably necessary to treat differently judges who are candidates for non-judicial office? How could members of the legal profession, political parties, vested interest groups and all others interested in elected positions fail to align themselves with one candidate or another in a contest for a judicial office? It is not difficult to imagine a situation with two or more judges seeking higher positions while serving in a judicial capacity. Surely at least one will lose. The record shows no basis for any less nor any more concern based upon such classification. And of course in any such race there could well be one or more non-judicial office holders likewise appealing to the same "power-groups." Certainly if judicial integrity is our concern, there is no legitimate basis to exclude judges who run for judicial office.

While we are not dealing with a judge running for a judicial office, the classification issue is squarely before us. What justification is there for the total lack of equal concern by the Louisiana legislature when non-judicial office holders seek non-judicial offices? The majority argues most persuasively the need for "honest judges." Is there less need for "honest mayors"? Is there less need for "honest governors"?

The list is endless and the answer obvious. The legal question presented is not so easily answered.

The majority rests its opinion upon a state concern and reasonably necessary restrictions -- not the unique aspects of judicial elections for indeed the experienced trial judge found there are none. I would agree that judicial responsibilities are unique and suggest they are also totally incompatible with the elective process. Certainly the federal appointive process and widespread state use of "merit retention" programs[2] recognize this feature of the third branch. But Louisiana has not removed its judicial candidates from the political arena. It could be argued the state has rather tied one hand behind a judge's back should he decide to run for any office other than judicial. This is hardly demonstrative of a legitimate concern for "good government". Nor, in my opinion, is it a classification consistent with the equal protection clause of the Fourteenth Amendment.

Resign to run laws do have merit and can be upheld.[3] At least one state, Florida, has passed muster by showing the

---

2. States differ in whether judges are first appointed and then run on their record (Missouri plan), to those having nominating commissions (such as those instigated by President Carter), to those with screening panels which select a list of qualified candidates from which the Governor makes his appointments (Florida).

3. A three judge panel has upheld those portions of Florida's resign to run law which are relevant to this case. *See Stack v. Adams,* 315 F. Supp. 1295 (D.Fla. 1970); *Deeb v. Adams,* 315 F.Supp. 1299 (D.Fla. 1970). It is interesting to note, however, that in *Stack* Florida law was held to be unconstitutional as applied to a public official who desired to run for office of United States Representative. The court reasoned that requiring a candidate for Congress to resign from office as a condition precedent to running for that position created an additional qualification not provided by the Constitution for election to Congress. The court held that the qualifications section of the Constitution was exclusive, and that a state could neither add to nor take away from it. While it has not been raised by any of the parties before this Court, one wonders whether the Louisiana statute is not vulnerable to a similar attack. Since the plaintiff is not running for a federal office, it is doubtful that he is the proper party to bring such an attack.



same concern discussed by the majority toward all office holders -- not merely judges. While that may not be the only possible classification able to withstand attack, it is extremely impressive by its equal treatment.

Recognizing this case as a difficult one and my voice as a lonely one, I, nevertheless, feel obliged to dissent. Classifications have been set up by the Louisiana statute and Canon which make little sense if the state of Louisiana is sincere about preserving the integrity of its judiciary. If, however, the state is not sincere in this belief, then a reevaluation of the First Amendment claim would be warranted since restrictions on First Amendment rights cannot be justified by a state interest that is less than compelling. Finding the present classifications violative of the Fourteenth Amendment, I would affirm the action of the trial court.[4]

---

4. I concur in those portions of the Court's en banc opinion which deal with the questions of jurisdiction and mootness.

## CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Rules of this Court, three copies of the Appendix to Original Brief of the Appellants have been served upon counsel of record for Appellees, Truman Woodward, Jur., 1100 Whitney Building, New Orleans, Louisiana 70130, by posting same, properly addressed, and postage prepaid, in the United States mail, this 21st day of March, 1978.

---

Counsel for Appellants